

## Child Sexual Abuse Redress and Civil Liability

On 19 June 2018, more than 5 years after the commencement of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), the Senate passed the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (the Act). All state and territory governments and major non-government institutions (including the Catholic Church, the Anglican Church, the Uniting Church, the Salvation Army, Scouts Australia and the YMCA) have committed to the scheme. The scheme commenced on 1 July 2018.

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### In this edition:

- **Redress scheme**  
Scheme design, Eligibility, Application process, Redress funding, Redress payment
- **Civil liability**  
Dual paths, Breaking down barriers, Litigation environment
- **Estimating your liabilities**

# Redress scheme

## Scheme design



### Scheme commencement and duration

The scheme commenced on 1 July 2018 and will operate for a period of 10 years (i.e. until 30 June 2028). There is some scope to extend the scheme duration beyond 10 years.

*Abuse must have occurred before 1 July 2018 to be included within the scope of the scheme. Applications must be lodged in the first 9 years of the scheme i.e. between 1 July 2018 and 30 June 2027.*

### Opting in

All Commonwealth institutions are deemed to be participating institutions. State, Territory and non-government institutions are only participating institutions if they opt-in to the scheme. Institutions can opt-in to the scheme until 30 June 2020.

An institution can opt-in to the scheme as part of a participating group formed by two or more related institutions.

*Members of the participating group benefit from the release of future liability from any responsible institution within the group. We expect there would also be administrative efficiencies and the possibility of sharing redress costs within the participating group. Funding of redress costs across the institutions within a participating group is at their discretion.*

### Redress components

The scheme will provide three elements of redress to eligible applicants of institutional child sexual abuse:

- A redress payment of up to \$150,000
- Access to state-based counselling and psychological services or payment of up to \$5,000 to access services outside the scheme, depending on where the person lives
- A direct personal response from each responsible participating institution at the request of the person.

*The redress payment cap of \$150,000 is lower than the Royal Commission's recommended cap of \$200,000. The redress and counselling payment will be in addition to other entitlements e.g. Centrelink payments, Medicare benefits etc.*

## Who is eligible for redress?

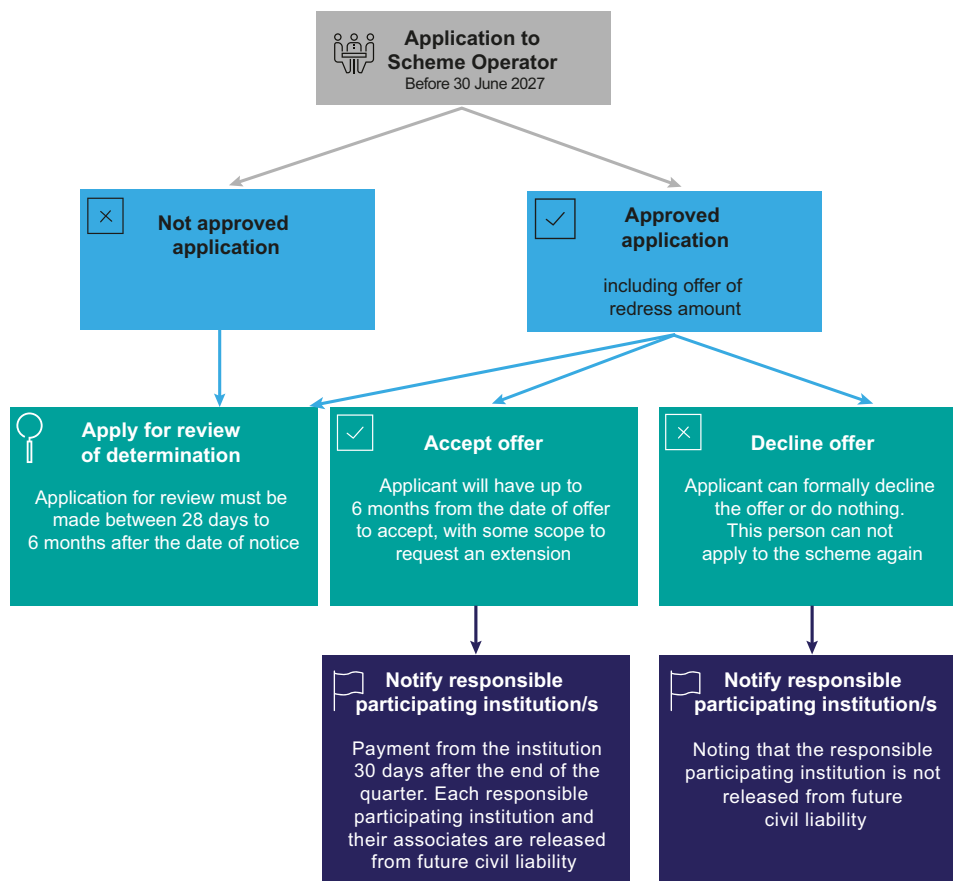
To be eligible for redress:

- Applicants must have been sexually abused as a child (aged under 18) and a participating institution is responsible for that abuse
- Applicants must be an Australian citizen or permanent resident at the time of applying for redress
- Applicants must turn 18 before 30 June 2028
- Applicants must not have received a payment of damages or compensation in the relation to the abuse to made via court-order by the institution identified in their application.

*A person can apply for redress if they have a criminal conviction. Those who have been convicted of a crime and sentenced to 5 or more years in gaol, will go through a special assessment process.*

## How does the application process work?

The diagram below shows the key milestones in the application process. A person's application can cover multiple instances of abuse across multiple institutions. Applicants will have access to support and legal assistance services throughout the application and decision making process. Institutions provide input during the assessment process, though they cannot request a review of the redress determination.



## Funding redress costs

Responsible institutions will be liable for redress payments, counselling and psychological costs, and administration fees, charged by the scheme operator quarterly in arrears.

A participating institution may be considered responsible if one or more of the following applies:

- The abuse occurred on the institution's premises or in connection with the institution's activities
- The alleged abuser was an official of the institution
- The institution was the legal guardian or responsible for the care of the person
- The institution was responsible for placing the person into the institution where the abuse occurred.

## Determining the redress payment

The redress payment amount will be assessed on an individual basis under an assessment framework.

*The details of the assessment framework have not been made publicly available.*

### Allowing for previous payments

All relevant prior monetary payments made to the applicant by the responsible participating institution will be taken into account. Prior payments are adjusted for inflation (prescribed as 1.9% p.a.) and exclude some legal fees and costs such as medical expenses.

*Prior monetary payments might include payments from past redress schemes, Victims of Crime schemes or settlements made by or on behalf of the responsible institution.*



## Shared responsibility

The scheme allows for sharing of redress costs where:

- More than one institution is found approximately equally responsible for a case of abuse. In this circumstance, the equally responsible institutions will share the costs of redress equally.
- A person experiences multiple instances of child sexual abuse. This circumstance is more complicated and detailed in the scheme rules. Each responsible institution will be apportioned a share of the redress payment based on the assessment framework.

### Example 1:

*Person A was placed by the State government into a non-government children's home and abused. Person A makes an application for redress which is approved on 15 June 2019. The non-government institution and the State are found to be equally responsible for the abuse. Based on the assessment framework the total amount payable to Person A is \$80,000<sup>1</sup>.*

*In this example:*

*State is liable for \$40,000*

*Non-government institution is liable for \$40,000*

### Example 2:

*(Continuing from example 1) The State made a redress payment to Person A on 2 May 2012 of \$10,000 (7 whole years before June 2019). The non-government institution made an ex-gratia payment to Person A on 5 August 2009 of \$30,000 (9 whole years before June 2019).*

*In this example:*

*State adjusted amount = \$10,000 x (1.019)<sup>7</sup> = \$11,408*

*State share = \$40,000 - \$11,408 = \$28,592*

*Non-government institution adjusted amount = \$30,000 x (1.019)<sup>9</sup> = \$41,461*

*Non-government institution share = \$40,000 - \$41,461 (which is less than 0) = nil \**

*Person A receives \$28,592 + nil = \$28,592*

*\* If a person's redress payment after deduction of past inflated payments is nil, this person is still entitled to other elements of the scheme (i.e. counselling and a personal response).*

*<sup>1</sup> These examples and the redress payment shown is for illustrative purposes only.*

## Defunct institutions

A participating government institution will act as the funder of last resort for institutions that no longer exist (or defunct institutions) where:

- The government and the defunct institution are found equally responsible for a case of abuse, and
- The government has agreed to be funder of last resort for the institution.

The government will be liable for the institution's share of redress costs, in addition to the government's own share.

*This arrangement is narrower than the Royal Commission's recommendations where governments would act as a funder of last resort for all institutions irrespective of whether the government was equally responsible for the abuse.*



# Civil liability

## Dual paths

The behaviour of applicants and their advisers (legal providers and advocacy groups) will drive the outcomes for both the National Redress Scheme and civil liability.

Under the scheme, applicants accepting an offer of redress will be required to release the responsible participating institutions, their officials and associates of the institutions from all civil liability for the sexual, and related non-sexual, abuse.

The scheme was never intended to replace civil liability, but rather the Royal Commission made recommendations that both would operate in parallel as alternative options for survivors of child sexual abuse.

## Breaking down barriers to civil liability

In the final report, the Royal Commission made a number of recommendations that sought to lessen the difficulties faced by survivors of institutional child sexual abuse in pursuing civil litigation. Many of these recommendations have already been adopted or are being considered by individual governments.



### Limitation periods

The Royal Commission recommended the introduction of legislation to retrospectively remove any limitation periods that apply to claims for institutional child sexual abuse. Historically, legislation and court interpretations have varied across states. The most common limitation period was 3 years, commencing from age 18 for a minor.



#### NSW, Victoria, Tasmania & NT:

Limitation periods have been abolished for all victims suffering abuse as a child, irrespective of the type and setting of abuse. Claims can now be brought against the institution or perpetrator regardless of time.



#### QLD and WA:

Limitation periods have been abolished for child abuse, but only if the abuse was sexual. i.e. limitation periods still remain for physical and/or psychological abuse.



#### ACT:

Similar to QLD and WA, except only if the sexual abuse occurred in an institution i.e. limitation periods still remain for sexual abuse occurring outside of institutions.



#### SA:

As yet there has been no legislated change to limitation periods.



### Duty of care

In child abuse litigation, there are multiple difficulties arising on the issue of duty of care including:

- Institutions generally have a non-delegable duty of care to children in their custody however this duty does not extend to the deliberate criminal acts of employees or volunteers
- Breach of a duty to take reasonable care is determined by reference to the standards at the time
- For employees, there is the question of vicarious liability, but courts have often determined that abuse was not 'in the normal course of employment' and therefore vicarious liability does not apply.

Victoria and NSW have recently legislated to impose a new duty of care on institutions to take "reasonable precautions" to prevent abuse of children committed by individuals associated with those institutions. In addition, institutions will now be held liable for the actions of non-employees like volunteers and religious officials who used their position to abuse children. These legislated changes are prospective only (i.e. does not apply to historical cases of abuse), and are aligned with the

recommendations made by the Royal Commission. It is yet to be seen if the other states and territories will follow suit, though if the pattern of legislative activity regarding limitation periods were repeated, we would expect to see gradual alignment of state legislation in this area.



### Identifying a proper defendant

Historically, an entity can be sued only if it has a distinct 'legal personality', meaning that it has legal rights, liabilities and duties, including the ability to sue and be sued. This issue of legal personality has presented a barrier to civil litigation for many survivors, where an institution cannot be identified or no longer exists. This issue was particularly highlighted through the case of Ellis and Pell.

Victoria, NSW and WA have legislated to exclude elements of the so called 'Ellis defence'. Under the new legislation, which has some differences between jurisdictions, officials are able to nominate assets to discharge any child sexual abuse liability, and in some instances courts have the power to appoint trustees to be sued if institutions fail to nominate one.



## A more litigious environment?

As the barriers to civil litigation have been eroded in recent years, and with the extensive publicity of the work of the Royal Commission and the National Redress Scheme, can we anticipate a dramatic change in the litigation environment for child abuse claims? While difficult to quantify, it would seem logical that an increase in the volume and quantum of costs of civil claims for child sexual abuse is inevitable, if indeed it is not already occurring.

Further, while the National Redress Scheme provides a desirable avenue for many survivors, there has been scrutiny in the media of late regarding the adequacy of maximum payment amounts available under redress compared with civil liability. It seems quite plausible that survivors of more severe instances of abuse may pursue civil litigation, while other survivors pursue redress, though at this stage this remains conjecture, and only time will tell.

In our view it also seems plausible that there could be an increase in class action activity, considering the way that class action law has developed in Australia in recent years and noting recent class actions for child abuse, such as the Retta Dixon Home class action in the Northern Territory and the Fairbridge Farm class action in NSW.

## Questions of Insurance

Insurance coverage for child sexual abuse is complex, particularly given the passage of time since most abuse cases and the difficulty in locating policy documentation. If insurance was with one of the former HIH Group companies - a number of whom had significant professional indemnity portfolios - then the insurer will no longer exist.

We expect there will continue to be discussions between institutions and insurers regarding how various insurance covers respond to civil litigation and redress. The standard of proof required to receive a redress payment is that there is a “reasonable likelihood” the person suffered institutional sexual abuse as a child.

This is a lower threshold than required in civil litigation and based on expert opinion is unlikely to be sufficient to “formally” trigger an institution’s insurance policy. However, there are a number of considerations including insurer-customer relations and potential adverse publicity among others that may lead to insurer contributions to funding redress.

We note the National Redress Scheme Act states that “Nothing...prevents a liability insurance contract from treating a redress payment (or a counselling and psychological services payment) as being a payment of compensation or damages”.



# Estimating your liabilities

For institutions, governments and insurers with child sexual abuse exposure, estimating these liabilities can be a difficult task given the significant uncertainties involved. Particularly, limited historical data, long reporting delays and the rapidly changing civil liability and redress environment can provide plenty of challenges.

Finity has developed an approach that we consider to be best practice in assessing the quantum of redress and civil litigation liabilities. This process involves investigation of historical exposures, analysis of past claims and allegations and benchmarking to other known information. The elements of our best practice process are highlighted in the following diagram.



Our liability estimation involves a ‘control cycle’ approach where we determine an initial liability estimate drawing on the factors above. Going forward, our approach is to monitor and revise the estimated liability to reflect emerging experience including the civil liability environment, legislative developments and changes in claimant behaviour as required.

## Need help?

Finity can help institutions, governments and insurers think about and assess their potential liabilities related to child sexual abuse redress and civil litigation. If you’d like to discuss how we can help, please contact the authors or your Finity consultant.

# About Finity

Finity Consulting is the largest independent general and health insurance actuarial consultancy in Australia. Our expertise is highly regarded and has been developed working in the industry since the early 1980s.

Through our industry publications we seek to share our insights into the key drivers of industry trends and to help our clients stay abreast of the latest issues that are important to their business.

If you would like to receive future updates on Child Sexual Abuse Redress and Civil Litigation, please contact: Renae Hoskins on +61 2 8252 3350 or at [renae.hoskins@finitivity.com.au](mailto:renae.hoskins@finitivity.com.au).

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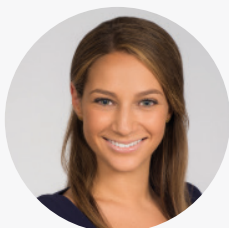
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